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In the Supreme Court of the United States

OCTOBER TERM 1982

JOHN E. McKENZIE, ET AL.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the prosecutors' refusal to accept the return of a No True Bill by the grand jury, in direct contravention of the District Court's grand jury charge, together with other acts of overreaching, did constitute misconduct sufficient to warrant dismissal of the indictment that was subsequently returned.

2. Whether the decision of the Court of Appeals condoning the challenged misconduct grants to prosecutors such excessive discretion that it encroaches on the independence of the grand jury in violation of the Fifth Amendment to the United States Constitution.

3. Whether the decision of the Court of Appeals overlooked a crucial issue when it failed to address the petitioners' contention that they suffered actual prejudice since the result of the prosecutors' misconduct was the return of a True Bill by the grand jury.

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PETITION FOR WRIT OF CERTIORARI

The petitioners John E. McKenzie, Dale Bonura, Stephen Farrar, Stephen Reboul, Ronald R. Brink, Thomas R. Woodall and Richard LeBlanc respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 18, 1982.

OPINION

The opinion of the Court of Appeals (Appendix B, *infra*, p. A-24) is reported in 678 F.2d 629. The opinion of the District Court for the Eastern District of Louisiana (Appendix A, *infra*, p. A-1) is reported in 524 F. Supp. 186.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 18, 1982. A timely petition for rehearing *en banc* was denied on August 30, 1982 and this petition for certiorari was filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,...

United States Code, Title 18 §2: Principals

United States Code, Title 18 §241: Conspiracy against the rights of citizens

United States Code, Title 18 §242: Deprivation of rights under color of law

See Appendix D, *infra*, p. A-39 for text of statutes.

STATEMENT OF THE CASE

Allegations of police brutality followed the investiga-

tion of the murder of a New Orleans police officer on November 8, 1980. Months later, amid intense public clamor, a federal grand jury was empaneled by the District Court for the Eastern District of Louisiana to scrutinize police conduct surrounding the tumultuous course of events.

The grand jury heard testimony from December, 1980, until July, 1981, finally indicting seven New Orleans homicide detectives on charges of violating 18 U.S.C. §2 and 18 U.S.C. § 242. These police officers were alleged to have beaten or otherwise intimidated persons thought to be witnesses of the murder. The seven were also charged under 18 U.S.C. § 241 with conspiracy to accomplish the alleged civil rights violations.

On August 18, 1981, the District Court granted a defense motion forcing the government to disclose portions of the grand jury transcript. The revealed portion reported the dialogue between the prosecutors and grand jurors occurring over the last two days of the grand jury deliberations, July 8 and 9, 1981.

On August 27, 1981, the petitioners moved to dismiss the indictment due to unconstitutional prosecutorial abuse of the grand jury proceedings. On September 14, 1981, the District Court granted the motion, dismissing the indictment because the defendants had been denied their constitutional right to be brought to trial only through fair and unbiased legal process.

The government appealed. On June 18, 1982, a panel for the Fifth Circuit Court of Appeals ordered the District Court's dismissal vacated. The Court of Appeals held that the prosecutors' misconduct was error, but not reversible error, and that the indictment should not have been dismissed because the challenged misconduct had not overborne the independent will of the grand jury. The Court reasoned that the petitioners were not prejudiced by the prosecutors' concededly erroneous misconduct.

The transcript of the grand jury deliberation during the final two days of its meeting reveals several instances of unusual prosecutorial misconduct. The major activities, crucial to a complete analysis of the issues herein are summarized as follows:

1. The prosecutors delivered an impassioned "closing argument" to the grand jury, containing numerous appeals to considerations other than the merits of the indictment;

2. Upon the grand jury's return, and with all parties aware that a decision had been made, the prosecutors misstated the law, refusing to accept the intended No True Bill;

3. This misleading and effective rebuff of the grand jury's attempt to conclude its work was followed by a protracted dialogue, in which the prosecutors questioned, coaxed, and pressured the grand jurors, trying to salvage

some acceptable indictment. This invasion into the secret deliberations and thought processes of the jurors was accompanied by repeated pleas from the prosecutors, urging the grand jurors to consent to reconsideration of the indictment. (See Trial Court's description of misleading and prejudicial comments and actions in Appendix A, *infra*) Following this course of government intervention and participation in the grand jury deliberations, a True Bill was returned.

The specific facts and dialogue are set out in Appendix F, *infra*, p. A-44.

REASONS FOR GRANTING THE WRIT

1. The decision below raises important questions of constitutional law regarding the integrity of the grand jury.

2. The Supreme Court has not clearly defined the permissible scope of proper prosecutorial conduct before the grand jury.

3. The case focuses current critical issues of alleged prosecutorial abuse and police brutality on a background of racial and political conflict. These issues are of intense public concern.

4. The decision below erroneously and dangerously expands the limits of allowable prosecutorial misconduct

before the grand jury, calling for exercise of the Court's supervisory powers over the federal judiciary to establish standards by which lower courts may be guided.

5. The decision below articulates an unrealistic and unworkable standard for proving prejudice to defendants claiming prosecutorial overreaching.

Because these five reasons overlap and interrelate, they are here developed and explained together. The important questions of constitutional law include, of course, questions of the permissible scope of prosecutorial conduct. Likewise, the concurrent intense public interest in racial harmony, as well as in peaceful citizen-police relations, adds urgency to the defendants' request for a hearing. Finally, the decision below constructs an unrealistic judicial standard and significantly loosens the reins on excessively aggressive prosecutors. The decision affords poor guidance to courts below and is likely to promulgate future injustice to the countless subjects of federal and state prosecution.

The hallowed reverence reserved in the common law for the grand jury is denigrated when prosecutors violate the resolute independence of that institution. That the grand jury truly function as a safeguard against government overreaching is at the core of the Fifth Amendment guarantee that a person may be prosecuted for serious crimes only by indictment of a fair and unbiased grand jury. *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35

L.Ed.2d 67 (1973); *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed 397 (1956).

The transcript of the final days of the grand jury proceedings starkly reveals in unambiguous dialogue that government prosecutors deceived the jurors regarding critical issues of fact and law, refused to accept an intended no-true bill, and then bullied the jurors into revealing details of their secret deliberations. This misconduct cumulated with previous appeals to prejudice, misstatements of law, and unbalanced presentations of evidence to produce an indictment, when one had not been forthcoming, thus substituting the prosecutor's will for that of the grand jury. (See Trial Court's description of the various abusive comments and actions in Appendix A, *infra*)

The prosecution concluded its presentation of the case with an impassioned "closing argument" that was a blatant appeal to prejudice. (See Appendix F, p. A-44 for text of the speech).

The remarks urged the jury to approve the indictment because all four prosecutors, including *the* United States Attorney, considered the charges justified. The harangue also described police officers in highly prejudicial terms.

When the grand jury concluded its deliberation, it

announced to the prosecutors its intention not to indict and asked if the group was to report their decision to the magistrate. The obviously dumbfounded presiding prosecutor uttered a response that has since been termed "incredible" by both courts below.

Mr. Johnson:

> "We have just encountered a point of law that I have never encountered before which is less than twelve grand jury votes." (R. X 176, lines 1-15).

This misstatement of fact and law, intentional or otherwise, was a refusal to accept the grand jury's decision. It was followed by intense probings and coaxing, in an ultimately successful effort to persuade the jurors to reconsider.

The Trial Court cogently observed in its opinion that both the Court and one of the prosecutors had specifically instructed the jurors, prior to their deliberation, that a vote of less than 12 members for an indictment should be endorsed "Not a True Bill" and returned to the Court. The Trial Court appropriately characterized the prosecutors' refusal to accept the jury's decision as "astonishing" and "incredible."

The Trial Court continued:

> The prosecutors then participated in the deliberations of the grand jury, in clear violation of the law. At the very least, all three of the government

attorneys then present participated in the grand jurors' deliberations concerning whether they wished to consider another indictment, different from that as to which they had voted a no true bill. After the deadlocked vote was announced, what occurred both on that evening and the next day was protracted deliberation, with the prosecutors and the jury participating—in effect an indictment negotiated by the government attorneys. (Appendix A, *infra*, p. A-18.)

Fundamental questions of constitutional significance arise:

1) May a prosecutor properly refuse to accept an announced decision of a grand jury?

2) May a prosecutor properly deceive a grand jury as to the effect of its decision?

3) May prosecutors properly urge grand jurors to disclose the content of their deliberations, after a decision not to indict has been announced?

4) Do these actions invade and vitiate the grand jury's independence?

5) Do these actions substitute the will of the prosecutors for that of the grand jury?

6) Can a prosecutors' refusal to accept an announced No True Bill not prejudice the intended defendants?

In its opinion below, the United States Court of Appeals for the Fifth Circuit condoned such government behavior, reasoning that the defendants had not been prejudiced by the concededly improper conduct. The Court, in its opinion, made no reference to the defendants' argument that they had suffered the greatest possible prejudice—that the indictment was *caused* by the prosecutorial misconduct. The precedential effect of a holding that rejects such a common sense appreciation of prejudice would be devastating to future victims of government abuse.

Additionally, the Court of Appeals' analysis refused to address the defendants' key argument that each act of abuse must be viewed as a part of the overall presentation to the jurors. Contrary to this argument, the Court below isolated each incident of misconduct, separately adjudging each to be insufficient to overbear the will of the grand jury. Again, this approach is unrealistic. Each act must be considered in the context of preceding displays of control and developing perceptions of authority. In this case, the continued, coercive acts of the prosecutors culminated in pressure on the final two days. While some of the remarks and actions may seem innocuous alone, they all contributed to the ultimate coercion.

Moreover, when cast on the background of previous case law (See Appendix E, *infra*, for specific cases) the Fifth Circuit's condonation of this extraordinary deception and bullying sends an unmistakable message to prosecutors that nothing short of physical abuse or perjury

will trigger judicial sanctions.

The contours outlining permissible government conduct are vague and this Court should seize this opportunity to articulate clear limits, for the benefit of government and citizen alike.

Furthermore, this case presents a particularly appropriate vehicle for providing such guidance because of its unique facts. The defendants are white New Orleans homicide detectives who are charged with violations of the civil rights of black citizens. At the time of the grand jury deliberations, tension ran high in New Orleans, where a new black majority had recently elected its first black mayor.

A state grand jury investigating the same alleged violations returned a No True Bill prior to the federal indictment. Charges and counter-charges of political and racial motivation for the continued prosecution flourished. Media expectations of riots in the city were widespread at the peak of the controversy.

The interests of justice are promoted when the law is clear and when critical issues are fully addressed and decided. Such has not occurred in this case. The Fifth Circuit did not confront the crucial issues and its opinion is both unclear and dangerously expansive. Neither the public nor lower courts have been well served. The case begs for review.

As Mr. Justice Brandeis admonished in his now famous dissent:

> "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479, 48 S.Ct. 564, 573, 72 L.Ed. 944 (1928).

CONCLUSION

For these reasons, a writ of certiorari should issue to review judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES of America

v.

John E. McKENZIE, et al.

Crim. A. No. 81-281.

United States District Court,
E. D. Louisiana.

Sept. 10, 1981

On a motion by defendants to dismiss indictment because of circumstances involved in grand jury proceedings, the District Court, Duplantier, J., held that in view of prosecutorial activity including repeated expression to grand jury of personal opinions of government attorneys as to credibility of various witnesses and as to weight and effect of evidence which grand jury had heard and including participation by prosecutors in deliberations of grand jury, in clear violation of law, indictment was invalid on constitutional grounds, and court also had duty to set same aside in exercise of supervisory power over grand jury proceedings.

Indictment dismissed.

1. Indictment and Information 10.1(4)

Nothing more or less is required than that indict-

ment be returned by legally constituted and independent grand jury, but fact that grand jury proceedings are secret, nonadversarial and almost totally under control of federal prosecutor magnifies concern that grand jury be independent. U.S.C.A.Const. Amend. 5.

2. Indictment and Information 10.1(4)

Unintentional prosecutorial behavior can cause improper influence and usurp role of grand jury, invalidating indictment. U.S.C.A.Const. Amend. 5.

3. Grand Jury 40

Rule provides for use of electronic recording device in courtroom during grand jury session. Fed.Rules Cr. Proc. Rule 6(e)(1), 18 U.S.C.A.

4. Grand Jury 33

Where it is necessary for court to exercise its supervisory powers due to abuse of grand jury process, existence of actual prejudice to accused is unnecessary. U.S.C.A.Const. Amend. 5.

5. Indictment and Information 10.1(4), 144.1(2)

In view of prosecutorial activity including repeated expression to grand jury of personal opinions of government attorneys as to credibility of various witnesses and

as to weight and effect of evidence which grand jury had heard and including participation by prosecutors in deliberations of grand jury, in clear violation of law, indictment was invalid on constitutional grounds, and court also had duty to set it aside in exercise of supervisory power over grand jury proceedings. U.S.C.A.Const. Amend. 5.

Michael D. Johnson, Stephen P. Clark, Linda L. Hagerty, Civ. Rights Div., Washington, D.C., Morris W. Reed, Asst. U. S. Atty., New Orleans, La., for plaintiff.

Ralph S. Whalen, Jr., New Orleans, La., for Dale Bonura, Stephen Farrar, Stephen Reboul and Ronald F. Brink.

Walter J. Rothschild, New Orleans, La., for Thomas Woodall, Richard LeBlanc.

Ralph Capitelli, New Orleans, La., for John E. McKenzie.

ORDER AND REASONS: MOTION TO DISMISS INDICTMENT

DUPLANTIER, District Judge.

On November 8, 1980, while on duty, New Orleans Police Patrolman Gregory Neupert was shot to death. His body was found next to his police car parked near a public

housing project in the Algiers area of New Orleans. There followed immediately an intensive investigation by the New Orleans Police Department to learn the identity of his murderers. On November 13, while police officers were engaged in an attempt to arrest three suspects, gun battles ensued, resulting in the death of the suspects. Three concurrent investigations into all of the circumstances were begun almost immediately, one by the New Orleans Police Department Internal Affairs Division, a second by the United States Department of Justice, Civil Rights Division and the New Orleans United States Attorney's office, with a federal grand jury, and a third by the District Attorney for the Parish of Orleans, with a local grand jury. These investigations concerned not only the events surrounding Neupert's murder and the subsequent killing of the three suspects, but also public allegations of police brutality allegedly occurring in the course of their efforts to apprehend whoever was responsible for Neupert's murder. On July 9, 1981, the federal grand jury returned an indictment containing numerous counts, all relating to alleged deprivation of the civil rights of various persons questioned by police following Neupert's murder. No indictment was returned related to the killing of the three suspects.

All seven defendants filed a motion to dismiss the indictment because of circumstances involved in the grand jury proceedings.

"No person shall be held to answer for a capital, or

otherwise infamous crime, unless on presentment or indictment of a Grand Jury, ..." Amendment V, Bill of Rights, United States Constitution.

As it has often done, the Supreme Court in *United States v. Calandra*, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974) emphasized the ancient role and solemn responsibilities of the grand jury:

> "The institution of the grand jury is deeply rooted in Anglo-American history. In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by a presentment or indictment of a Grand Jury.' *Cf. Costello v. United States*, 350 U.S. 359, 361-362 [, 76 S.Ct. 406 [407-408], 100 L.Ed. 397] (1956). The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. *Branzburg v. Hayes*, 408 U.S. 665, 686-687 [, 92 S.Ct. 2646 [2659], 33 L.Ed.2d 626] (1972)." (Footnote omitted).

[1] The Fifth Amendment guarantees an individual the right to be charged with a felony only by an indictment of an independent and unbiased grand jury. *Costello v.*

United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956). As the Supreme Court stated in *Wood v. Georgia*, "[The grand jury] ... has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused," 370 U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1962). Nothing more or less is required than that an indictment be returned by a legally constituted and independent grand jury. *Costello v. United States, Id.* at 363, 79 S.Ct. at 408. In the absence of that independence, a grand jury no longer performs its vital function of protecting the rights of individuals but rather becomes the tool of the prosecutor. The fact that grand jury proceedings are secret, non-adversarial and almost totally under the control of the federal prosecutor magnifies this concern that the grand jury be independent. *United States v. Serubo*, 604 F.2d 807 (3rd Cir. 1976); *United States v. Samango*, 607 F.2d 877, 883 (9th Cir. 1979).

Cognizant of the importance of the grand jury and concerned that grand juries should be properly guided in the performance of their duties, in 1978 the Judicial Conference of the United States approved a model grand jury charge for use by district courts throughout the nation. In the presence of government prosecutors, the grand jury which returned the indictment in this case was given that charge by the court. Reference is made hereafter to portions of the charge; two statements in the introductory part of the charge are pertinent here:

"The duties with which you [as grand jurors] are charged are of the highest importance to the proper administration of justice."

"The resolute independence of the grand jury came about only after considerable blood was shed and punishment meted out to our forebearers."

The Judicial Conference charge admonishes the members of the grand jury: "...you, in a very real sense, stand between the government and the accused." At issue here is whether activities of the government through its prosecuting attorneys have effectively prevented the grand jury from maintaining that "resolute independence" for which our forebearers' blood was shed, so that the grand jury could not "stand between the government and the accused."

[2] In determining the validity of this indictment, the issue is not the good faith of the grand jury or of the prosecutors. Unintentional prosecutorial behavior can cause improper influence and usurp the role of the grand jury. "The greatest dangers to liberty lurk in insidious encroachment by men of zeal..." Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 479, 48 S.Ct. 564, 573, 72 L.Ed. 944 (1928). Dismissal of an indictment on account of activities by prosecutors before the grand jury can be based either upon the constitutional rights of defendants under the Fifth Amendment or upon the court's inherent supervisory powers. In either case, the court's goal is to protect the integrity of the criminal justice system,

"particularly the functions of the grand jury, from unfair or improper prosecutorial conduct." (Citations and footnotes omitted.) *United States v. Chanen*, 549 F.2d 1306, 1309 (9th Cir. 1977).

[3] The court is mindful of the deference rightfully accorded to grand jury proceedings. *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972). As other courts have been in considering attacks upon indictments, we are reluctant to interfere with prosecutorial direction or to encroach on the independence of the grand jury. It is a close question whether this is one of those unusual cases in which an indictment must be dismissed to protect the constitutional rights of those indicted or the integrity of the judicial process. The line between the discharge by government attorneys of their responsibility to seek a grand jury indictment when in their opinion it is justified and abuse of the grand jury process is sometimes a thin and indistinct one. Nevertheless, after careful and thoughtful consideration of the transcript[1] of the grand jury proceedings the court is

[1] Our analysis of prosecutors' activity is limited largely to the transcript of the last two days of grand jury proceedings immediately preceding the indictment. The government attorneys declined the court's repeated invitation to call the court's attention to any other part of the lengthy investigation they consider pertinent. Although controversy developed over the transcript, there is no basis for concluding that the transcript is not substantially accurate and complete. However, it would certainly be preferable if the proceedings were recorded electronically as well as by a court reporter as is done in most trials. This could be especially helpful when more than one person is speaking at the same time, which occurs frequently in grand jury proceedings at critical stages and which did occur here. These exchanges were not and cannot be recorded by a court reporter alone. In response to the court's question as to whether he had a tape recording of the grand jury session, the official grand jury court reporter testified that no recording was made be-

left with the firm conviction that that thin and indistinct line was crossed in this case.

[4] The court dismisses this indictment both on constitutional grounds and under its duty to exercise supervisory power over grand jury proceedings.[2] We are convinced that the defendants have been denied their constitutional right not to be brought to trial except after a valid indictment. We are equally convinced that the integrity of the grand jury process must be protected from prosecutorial activity such as has occurred here. To refuse to dismiss this indictment would invite the repetition of such activity in future grand jury proceeding by signifying the court's approval thereof.

[5] We have attempted to review all of the relevant jurisprudence, including those cases brought to our attention by counsel and those found through our independent research. We make no detailed analysis in this opinion of any of these cases because we have found, as did the court

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(Footnote 1 continued)
cause "An electronic recording machine is not allowed in the grand jury room." In actuality, Rule 6(e)(1), F.R.Cr.P. specifically provides for the use of "an electronic recording device."

[2] In those situations where it is necessary for the court to exercise its supervisory powers due to an abuse of the grand jury process, the existence of actual prejudice to the accused is unnecessary. *See United States v. Phillips Petroleum Co.*, 435 F.Supp. 610 (N.D.Okla.1977) where the court in its exercise of its supervisory powers, dismissed the entire indictment even though not all counts of the indictment were affected by government misconduct.

in *United States v. Chanen*, that "(a)lmost every court dealing with the issue raised here has confronted a novel set of facts." 549 F.2d 1307, 1309 (9th Cir. 1977). A review of these prior decisions reveals that although most courts have resisted dismissing indictments for prosecutorial activity before the grand jury,[3] other courts have not hesitated to dismiss indictments where the prosecutors' activities have warranted dismissal.[4] Not one of these prior decisions involves circumstances even remotely similar to the unusual and perhaps unique circumstances surrounding this indictment.

Among numerous such instances called to the court's attention by defendants' motion, we list here some of the improper actions by the prosecutors (there were two attorneys from the Justice Department, Civil Rights Division and one local Assistant U.S. Attorney present at almost all times). A number of these actions, standing alone, would not warrant judicial intervention. The totality cannot merit the stamp of judicial approval. The cumulative effect of the various activities of the prosecutors who appeared before the grand jury was to prevent the grand jury from performing its independent role.

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[3] *See e.g. United States v. Cederquist*, 641 F.2d 1347 (9th Cir. 1981); *United States v. Trass*, 644 F.2d 791 (9th Cir. 1981); *United States v. Chanen*, 549 F.2d 1306 (9th Cir. 1977).

[4] *See e. g. United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972); *United States v. Wells*, 163 F. 313 (D.Idaho 1908); *United States v. DeMarco*, 401 F.Supp. 505 (C.D.Cal.1975); *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610 (N.D.Okl.1977); *United States v. Braniff Airways, Inc.*, 428 F.Supp. 579 (W.D.Texas1977).

As indicated above, the grand jury had engaged in an eight month pressure-packed investigation of public allegations that, following the murder of a local police officer in the course of duty, members of the New Orleans Police Department had brutalized numerous persons thought to have information about the murder and thereafter without justification had shot to death several persons suspected of the murder. The federal inquiry and the concurrent one by the local district attorney were the subject of almost daily media reports, often front page newspaper articles and lead news on radio and television. The exhibits in evidence in support of the defendants' pending motion for change of venue indicate the pressure under which the grand jury was working as it undertook its deliberations.

At the outset of the penultimate day of the grand jury proceedings the prosecutors engaged in repeated references to press reports and to suspected leaks to the press of confidential grand jury information. Moreover, the government attorneys made the grand jury a virtual battlefield in the war between themselves and the Orleans Parish District Attorney's office, a war in which the grand jurors were conscripted on the federal side, through repeated use by federal prosecutors of grand jury subpoenas and constant inuendo concerning the local district attorney. For example, there are several references to unsuccessful attempts to obtain information from the district attorney on an "exchange" basis or by subpoena. The inference is made that if the efforts had succeeded, the grand

jury would have had additional support for an indictment. Of course, none of these comments by the prosecutors were evidence, nor did they serve any proper purpose.

After a U.S. District Judge had granted a motion to quash a government subpoena for production of state records, and again when the judge delayed enforcement of another subpoena directed to two investigators of the local district attorney, the prosecutors misled the grand jury by stating that appellate review "would substantially delay" the proceedings (Tr. 8); "This means that we wait a couple of months or forget about their testimony." (Tr. 53). In fact, supervisory relief from the Fifth Circuit Court of Appeal was available in a much shorter period. With no suggestion of urgency by the government attorneys, the Fifth Circuit acted upon the local district attorney's appeal in 17 days. *In Re Muller* and *Clark*, No. 81-3405, July 27, 1981. Indeed, in similar situations supervisory relief is often granted within a few days.

At an early point during this session, (Tr. 25 and 26) the jurors discussed a visit by one or more of them to a cemetery, apparently agreed upon at a previous grand jury session. Some jurors considered the details of the scene significant in the determination of the credibility of a witness. Although it is clear that no juror should visit a scene and report his findings to the other jurors and that "evidence" concerning such a visit should not be considered or even discussed, apparently not one of the prosecuting attorneys called that to the attention of the grand

jury. In effect, they permitted a grand juror to become a "witness."

On numerous occasions during the grand jury's final two days, several government attorneys repeatedly expressed to the grand jury their personal opinions as to the credibility of various witnesses and as to the weight and effect of the evidence which the grand jury had heard. A trial tactic uniformly condemned by courts and warranting reversal of a guilty verdict occurs when a prosecutor expresses to a jury his personal opinion on the merits of the case or the credibility of a witness. "It is particularly improper, even pernicious, for the prosecutor to seek to invoke his personal status as the government's attorney or the sanction of the government itself as a basis for conviction of a criminal defendant." *United States v. Garza*, 608 F.2d 659 (5th Cir. 1979). We recognize that there is a myriad of prosecutorial conduct which is forbidden at trial yet is permitted before the grand jury. Certainly the very presentation of the indictment and supporting evidence informs the grand jury that the government attorneys are convinced that an indictment should be returned. A single statement by a prosecutor as to his personal opinion would not in itself invalidate an indictment. But what occurred in this regard before this grand jury cannot be countenanced. One of the Civil Rights Division attorneys gave a lengthy summary of the evidence, in which he included several references to his personal belief as to credibility of certain witnesses. The other then thanked the grand jury for its efforts in a rather personal manner: "We all think very

highly of this group and the manner in which you have worked ..." (Tr. 137)[5] Thus one prosecutor had reviewed the evidence, explained the law, and urged an indictment. A second prosecutor had thanked the jury and praised them. Just before formal deliberation began, the third prosecutor, the local Assistant United States Attorney, not only added his own personal appeal but also that of the U.S. Attorney himself, Mr. Volz. (Tr. 159).

> The indictment is signed John Volz, Stephen P. Clark, Michael D. Johnson, and Morris W. Reed. And, that would not have been—he would not have signed the indictment without a careful examination of all the evidence that has been presented to you and the relevant statutes involved that appear on the front of the indictment. And, he would not have signed the indictment had he not though that the evidence—had he not thought that the evidence satisfied—that the evidence satisfied the elements of the statutes....[6]
>
> That goes for me, also.
>
> One brief comment from me. And, please, if a question comes up about any evidence or

---

[5] These prosecutors invoked not only their personal status as government attorneys but also a personal "first name" relationship with the grand jury. They repeatedly refer to each other as "Morris", "Steve", and "Mike." See, e.g., Tr. 12, 21, and 23, 137. Not surprisingly the grand jurors do likewise. "A Juror: 'Mike, he can give me a job.' " Tr. 21. "A Juror: ...Mike came and gave us the answer." Tr. 177.

[6] There is no question about the impropriety of this statement concerning the United States Attorney's personal opinion as to the evidence. Also, there is serious doubt as to its accuracy. When Mr. Volz later is summoned from the "Brilab" trial, he makes it clear that he has not been with the grand jury "in a long time" and has had little time to devote to its investigation.

anything that has taken place with the evidence and you want to see Mr. Volz, he is available to you ...

At this point the prosecutor permitted his zeal to overcome his obligation not to appeal to prejudice:

I would like to briefly say that everyone would like to think that our police officers are performing their duties and performing the duties according to law. We certainly hate to see any police officers outside of the law. However, a police officer, because he dons a police badge and gun and night stick and blackjack and mace and has the authority to make arrest and use that force to take custody and have that individual bound over by the Court for trial, he does not have the authority that places him above the law. And, when a police officer, just like a politician or anybody else, violates the laws, they must be held accountable for people to retain and maintain faith in the system, in our system, as it works.

For emphasis, the Assistant U.S. Attorney concluded with a forceful statement that by signing the indictment he and his superior were expressing their personal opinions that the evidence justified an indictment.

So, I just wanted to say that by Mr. Volz signing this indictment and also by my signing this indictment, this indicates that we think—this indicates that in evaluation of the evidence by us, it seems—we have concluded certain—that it has certainly satisfied the statutes and all the elements as dictated by the law. We are satisfied by the evidence that's been presented to this

Jury, and it's up to you Ladies and Gentlemen to make your decision during your deliberations.

We agree with the recent decision by the Ninth Circuit that the mere fact that a "prosecutor's impression as to the guilt or innocence of the defendants had been conveyed to the grand jury" is not a sufficient basis for dismissal of an indictment, because grand jurors, as a practical matter ... are aware that a case is being presented to them because the prosecution feels that an indictment is warranted." *United States v. Cederquist*, 641 F.2d 1347, (9th Cir. 1981). But this clearly is not a case where the prosecutors merely conveyed their impression that the defendants were guilty. Instead, the prosecutors constantly reminded the grand jury that all four of them signed the indictment because in their opinion the jury should return it; they substituted their opinion as to the evidence for that of the grand jury, depriving the grand jury of its independence.

Another serious instance of objectionable activity on the part of the prosecutors occurred after a period of grand jury deliberation outside the presence of government attorneys, the duration of which is not indicated by the transcript. The grand jurors advised the prosecutors that they had "concluded [their] work." There is no transcript of that notification, but as soon as the government attorneys rejoined the grand jury (Tr. 175), the announcement was repeated on the record.

A JUROR:

> We have a discussion going that—well, being in the final analysis of all the things that we had in the past, you know, that everyone had the chance to cast their ballot according to what they believed, and that it came out ten-ten. And, that's the way it stands. Do we go before the Federal Magistrate with this?

The juror's question is answered in the court's charge recommended by the Judicial Conference of the United States: "If less than 12 members of the Grand Jury vote in favor of an indictment which has been submitted to you for your consideration, the foreperson will endorse the indictment 'Not a True Bill' and return it to the court, and the court will impound it." The grand jury had been given similar advice by one of the prosecutors before its deliberation. (Tr. 174). The prosecutors' actions following the announcement of the 10-10 vote are astonishing. The government attorneys improperly participated in grand jury deliberations and exerted undue pressure to secure an indictment.

At the outset the grand jury was misled as to the effect of fewer than 12 votes for an indictment after full deliberation. The government attorneys should have advised the jury that it was obliged to follow the court's charge set forth above. Considering his earlier correct advice to the jury as to the effect of fewer than 12 votes for an indictment, the response of the government attorney to the juror's question, "Do we go before the Federal Magistrate with this?" is incredible:

> We have just encountered a point of law that I have never encountered before which is less than twelve Grand Jury votes.

The prosecutors then participated in the deliberations of the grand jury, in clear violation of the law.[7] At the very least, all three of the government attorneys then present participated in the grand jurors' deliberations concerning whether they wished to consider another indictment, different from that as to which they had voted a no true bill. After the deadlocked vote was announced, what occurred both on that evening and the next day was protracted deliberation, with the prosecutors and the jury participating—in effect an indictment negotiated by the government attorneys. At one point a prosecutor obviously realized that he and his associates were deliberating with the grand jury: "I don't want to get too much into your thoughts and deliberation process. I don't want to get into that at all." (Tr. 181). Nevertheless, the attorneys continued for a long time to deliberate with the jury, stressing repeatedly the importance and the lengthy duration of the investigation.

Much earlier in the session, (Tr. 24), a Civil Rights Division attorney properly advised the grand jury that during its own deliberations outside the presence of the prosecutors it could decide to indict on less than an entire indictment, but that the jury should not "call in the pro-

[7] There is a serious question as to whether the lengthy discussion by prosecutors with various jurors before the formal deliberation culminating in the 10-10 vote also constituted prohibited participation in deliberation.

secution" and invite its participation in deliberations. Notwithstanding, the prosecutors repeatedly and persistently probed into the jurors' thought processes after the vote was announced, refusing to accept the repeated statements by the jurors, of which the following at p. 184 of the transcript is an example:

> You asked for a decision. We have voted. We have voted on written ballots. There is no chance the count was not correct. It's over. That's it. Over. Finished.

Urged on by prosecutors, the jury again deliberated privately and voted to reconsider an indictment as to "the beatings" only. The prosecutors did not accept that decision by the jury. Instead, they engaged in lengthy deliberations with the jurors concerning what they considered unlawful detention.

When the grand jury deliberated the next day, they again did so with the active participation of the three prosecutors. (Tr. 266-272). When a grand juror asked the simple question, "...can the conspiracy count be dropped entirely?", the prosecutor engaged in a lengthy deliberation as to whether it should be dropped and pleaded not to do so, culminating in the following inflammatory and highly prejudicial statement concerning "evidence" never presented to the grand jury (Tr. 272-275):

> ...in fact, many, many, many more people were taken downtown and make allegations of having been beaten in the very same manner. All that

evidence could be put in if there is a conspiracy charge in the indictment. That evidence, most likely, almost assuredly, would not be put in if the conspiracy charge were omitted.

Undue pressure was put upon the members of the grand jury to return some kind of indictment. In effect, the prosecutive team refused to accept any other result.

After the other prosecutor's misleading statement about the effect of the deadlock vote, the local Assistant United States Attorney then once again invoked the stature of the United States Attorney himself: "Let me check with Mr. Volz and see what he wants.." (Underscoring added). Apparently he did just that, for the U.S. Attorney came in later with his chief assistant (there were then *five prosecutors* with the grand jury) and told the jury "what he wants." "I don't see why you don't do it tomorrow." (Tr. 211). To his credit, the statements of the U.S. Attorney were temperate and balanced. But the very presence of *the* United States Attorney and his chief assistant at this critical stage, after a long absence, both taking time out from their much publicized role in the "Brilab" trial, constituted undue pressure upon the grand jury to reconsider the vote and return an indictment. Their appearance served to underscore the earlier statements by his assistant that the U.S. Attorney was personally convinced that there was credible evidence of guilt. The appearance of these two additional prosecutors at that stage was clearly a coercive factor, albeit that it was undoubtedly well-intentioned.

We have referred several times to violations of the model grand jury charge recommended by the United States Judicial Conference and given to this jury when it began its work. The government attorneys permitted and indeed at times persuaded the jury to disregard two other injunctions in that charge:

> "The content of your deliberations ...may not be disclosed even to the government attorneys."
>
> "Although you must work closely with the government, you must not yield your powers nor forego your independence of spirit."

In determining the validity of this indictment under all of the foregoing circumstances, the guilt or innocence of the defendants is of course not at issue. Indeed, the court's task here is not to review all of the evidence presented to the grand jury to determine whether it was sufficient to sustain an indictment, as an appellate court often must do to determine whether trial error was of sufficient magnitude to warrant setting aside a conviction.

As previously noted, we dismiss this indictment not only out of concern for constitutional due process but in exercise of our inherent supervisory powers as well. We must protect the rights of the accused in this case and also the integrity of the criminal justice system. The court has the duty of insuring that the grand jury performs its proper function in our system of justice by standing as the bulwark between the individual and the government. It is incumbent upon the court to supervise the grand jury pro-

cess and, where necessary, to intervene to assure the independence of the grand jury. The 3d Circuit has articulately outlined the concerns involved in *United States v. Serubo*, 604 F.2d at 817.

> We recognize that dismissal of an indictment may impose important costs upon the prosecution and the public. At a minimum, the government will be required to present its evidence to a grand jury unaffected by bias or prejudice. But the costs of continued unchecked prosecutorial misconduct are also substantial. This is particularly so before the grand jury, where the prosecutor operates without the check of a judge or a trained legal adversary, and virtually immune from public scrutiny. The prosecutor's abuse of his special relationship to the grand jury poses an enormous risk to defendants as well. For while in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo. Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened.

We have already noted the scarcity of precedent to guide prosecutors, grand juries and district courts. There are issues presented here as to which reasonable persons may well disagree. If this court is in error in resolving these novel and difficult questions, the error can be remedied

promptly by an expedited appeal. Moreover, the government could present the matter properly to another grand jury. If this order is reversed on appeal or if a proper indictment is later returned by another grand jury, the guilt or innocence of these defendants can then be determined at a trial unclouded by the issue of the validity of the indictment.

The court's decision should not be construed as an open invitation to invade grand jury secrecy in every case, nor as a limitation upon the right of a prosecutor fairly to summarize evidence and law prior to submission of an indictment to a grand jury for deliberation and decision. Neither does this decision imply that every error by a prosecutor in his conduct before a grand jury will result in an invalid indictment. Rather it is a signal to prosecutors that there are limits beyond which they cannot go in their relationship with grand juries. Even though they act in good faith and out of commendable motives in seeking an indictment, prosecutors can no more violate constitutional rights than can those they seek to prosecute for violating constitutional rights of others. It is a mark of the majesty of the United States Constitution that it applies alike to the murderers of officer Gregory Neupert, to those who would seek to shield these murderers, and to the policemen who seek to apprehend them. All who violate the law should be brought to justice, but only through lawful constitutional efforts.

APPENDIX "B"

UNITED STATES of America,
Plaintiff-Appellants,

v.

John E. McKENZIE, Dale Bonura, Stephen Farrar, Stephen Reboul, Ronald F. Brink, Thomas R. Woodall and Richard LeBlanc, Defendants-Appellees.

No. 81-3551

United States Court of Appeals,
Fifth Circuit

June 18, 1982.

The United States District Court for the Eastern District of Louisiana, Adrian G. Duplantier, J., 524 F.Supp. 186, entered judgment dismissing indictment, and appeal was taken. The Court of Appeals, Gee, Circuit Judge, held that: (1) neither prosecutors' telling grand jury that district court was wrong in quashing subpoena served on district attorney but that they had decided not to appeal because it would delay grand jury's consideration of indictment, prosecutors' allowing juror to discuss visit to cemetery that had been mentioned by witness earlier in proceedings, prosecutors' telling grand jury that all prosecutors thought indictment was warranted since they had all signed it, nor prosecutors' expressing opinions on credibility of witnesses constituted error such as warranted quashing indictment; prosecutor's response to ten-ten vote on indictment, that "We have just encountered a

point of law that I have never encountered before which is less than 12 grand jury votes," was error but was not reversible error where subsequent proceedings demonstrated that grand jury definitely exercised its own independent will and was not overborne by prosecution, and (2) there was no doctrine that limited grand jury to one vote on proposed indictment, and prosecutors were free to submit alternative proposed indictments to the jury.

Order vacated and indictment reinstated.

1. Indictment and Information 144.1(2)

Even in case of most egregious prosecutorial misconduct, indictment may be dismissed only upon showing of actual prejudice to accused; indictment will be dismissed only when prosecutorial misconduct amounts to overbearing will of grand jury so that the indictment is, in effect, that of prosecutor rather than grand jury.

2. Criminal Law 1166(2)
Indictment and Information 137(3)

Neither prosecutors' telling grand jury that district court was wrong in quashing subpoena served on district attorney but that they had decided not to appeal because it would delay grand jury's consideration of indictment, prosecutors' allowing juror to discuss visit to cemetery that had been mentioned by witness earlier in proceedings, prosecutors' telling grand jury that all prosecutors thought in-

dictment was warranted since they had all signed it, nor prosecutors' expressing opinions on credibility of witnesses constituted error such as warranted quashing indictment; prosecutor's response to ten-ten vote on indictment, that "We have just encountered a point of law that I have never encountered before which is less than 12 grand jury votes," was error but was not reversible error where subsequent proceeding demonstrated that grand jury definitely exercised its own independent will and was not overborne by prosecution.

3. Grand Jury 36

Rules of evidence that apply to trials do not apply in grand jury proceedings. Fed.Rules Evid. Rule 1101(d)(2), 28 U.S.C.A.

4. Grand Jury 34

Prosecutor may not involve himself in deliberation of grand jury but he may advise grand jury as to its duty.

5. Grand Jury 33, 34

There was no doctrine that limited grand jury to one vote on proposed indictment, and prosecutors were free to submit alternative proposed indictments to the jury.

John P. Volz, U. S. Atty., Morris Reed, Asst. U. S. Atty., New Orleans, La., Michael Johnson, Mark L. Gross, William Bradford Reynolds, Walter W. Barnett, Attys., Daniel F. Rinzel, Crim. Section, Civil Rights Division, Dept. of Justice, Washington, D.C., for plaintiffs-appellants.

Ralph Capitelli, New Orleans, La., for McKenzie.

Ralph S. Whalen, New Orleans, La., for Bonura, Farrar, Reboul and Brink.

Wally Rothschild, New Orleans, La., for Woodall and LeBlanc.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CLARK, Chief Judge, GEE and GARWOOD, Circuit Judges.

GEE, Circuit Judge:

The district court dismissed the indictment in this case because of prosecutorial misconduct, and the government appeals.

On November 8, 1980, a New Orleans police officer was shot to death. There followed an intensive investigation by the police department to learn the identity of his

murderers. During the investigation four citizens were killed by New Orleans police officers amidst allegations of beatings, illegal interrogations, and illegal arrests by police. The Department of Justice empaneled a grand jury to investigate whether the alleged police misconduct violated federal law. The grand jury sat between December 1980 and July 1981, hearing about 50 witnesses, and returned an indictment charging seven New Orleans homicide detectives with violating 18 U.S.C. § 2, § 242 (deprivation of liberty without due process while acting under color of law) and 18 U.S.C. § 241 (conspiracy to deny liberty rights without due process). In response to defendants' motion for a bill of particulars, the district court reviewed in camera the transcript of discussions between the prosecution and the grand jury over the last two days of the grand jury. The court ordered the bulk of the transcripts released to the defendants, and the defendants moved to dismiss the indictments for prosecutorial misconduct before the grand jury. After a two-day hearing, the court dismissed the indictment on two grounds: (1) defendants' constitutional right not to be brought to trial except after a valid indictment and (2) the district court's supervisory power to protect the integrity of the grand jury process. The district court further stated that "[i]n those situations where it is necessary for the court to exercise its supervisory powers due to an abuse of the grand jury process, the existence of actual prejudice to the accused is unnecessary," citing *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610 (N.D.Okla.1977).

[1] This conclusion contradicts the rule of this circuit, which states that even in the case of the most "egregious prosecutorial misconduct," the indictment may be dismissed only "upon a showing of actual prejudice to the accused." *United States v. Merlino*, 595 F.2d 1016, 1018 (5th Cir. 1979), *cert. denied*, 444 U.S. 1071, 100 S.Ct. 1014, 62 L.Ed.2d 752 (1980). Thus, whether the court is acting under its supervisory authority or its duty to protect the constitutional rights of defendants, an indictment may be dismissed only where the defendants' case has been unfairly prejudiced. In an attempt to define prejudice in this situation, we have stated that "[i]nflammatory remarks made by a prosecutor justify the dismissal of an indictment if the improper remarks so bias the grand jurors that their votes were based on their bias." *United States v. Cathey*, 591 F.2d 268, 273-74 (5th Cir. 1979). In other words, we will dismiss an indictment only when prosecutorial misconduct amounts to overbearing the will of the grand jury so that the indictment is, in effect, that of the prosecutor rather than the grand jury.

The defendants urge us to reconsider this rule and to apply a different standard when we are reviewing an indictment under supervisory powers rather than on constitutional grounds. It is argued that even in the absence of actual prejudice we must not condone such misdeeds; that to do so would impugn the integrity of our judicial system. However, we believe that as long as the grand jury maintains its discretion and independence our hands have not been sullied.

The defendants also point out that the prosecutorial conduct in this case would have required reversal had it occurred before a petit jury in a trial situation. The arguments that apply to petit juries do not apply to grand juries, and there is much prosecutorial conduct that is forbidden at trial but is permitted before the grand jury. The indictment is a preliminary step, and the defendant will have the safeguards associated with trial to insure that he will not be improperly convicted.

Thus it is our task to see that the grand jury served its proper function in the case before us. The fifth amendment states that no person shall be held to answer for a capital or otherwise infamous crime "unless on a presentment or indictment of a grand jury." "This constitutional guarantee presupposes an investigative body 'acting independently of either prosecuting attorney or judge,' *Stirone v. United States*, 361 U.S. 212, 218 [80 S.Ct. 270, 273, 4 L.Ed.2d 252] (1960), whose mission is to clear the innocent, no less than bring to trial those who may be guilty." *United States v. Dionisio*, 410 U.S. 1, 16-17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1973). The grand jury has historically served as a "protective bulwark standing solidly between the ordinary citizen and the overzealous prosecutor." *Id.* at 17, 93 S.Ct. at 773. The grand jury performed precisely this function in the case before us.

The initial indictment proposed by prosecutors had eleven counts and ten defendants and was rejected by the grand jury. The indictment that was returned by the grand

jury had only five counts and seven defendants. The transcript of the last two days of grand jury proceedings shows an active, independent, and questioning grand jury that was familiar with a long and involved record and that questioned, rather than submitted to, statements and suggestions of the federal prosecutors.

[2] The district court, in dismissing the indictment, listed several indiscretions by the prosecution but never actually found "prejudice." We will therefore review the prosecutors' activities under the standards enunciated above to determine whether the will of the grand jury was overborne.

The prosecutors referred to unsuccessful attempts to obtain information from the district attorney on either an exchange or subpoena basis. The prosecutors told the grand jury that the court was wrong in quashing a subpoena served on the district attorney but that they had decided not to appeal because it would delay the grand jury's consideration of the indictment. The district court found that the prosecutors conveyed the impression that the evidence the district attorney refused to turn over would provide additional support for an indictment. However, the prosecutors stated that they wanted this information only to insure that no evidence had been overlooked and to compare the identifications the alleged victims had made to state officials with the identifications those same persons made for the federal grand jury. Further, the discussion of this matter was brief and objective.

There is no basis for a finding that this discussion could have affected the jury's consideration of the indictment.

[3] The district court further found that prosecutors erred in allowing a juror to discuss a visit to a cemetery that had been mentioned by a witness earlier in the proceedings. The juror's visit to the cemetery and the subsequent discussion was not improper, and the prosecutor did not err in failing to direct the jury not to discuss the visit. The rules of evidence that apply to trials do not apply in grand jury proceedings. Fed.R.Evid. 1101(d)(2). Our federal grand jury was modeled after its English progenitor in which the jurors were not hampered by rigid procedures and could, in fact, act on their own knowledge in considering an indictment. *Costello v. United States*, 350 U.S. 359, 362, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956). The Supreme Court has said that grand juries may initiate investigations based on "tips, rumors, evidence offered by the prosecutor, and their own personal knowledge." *United States v. Dionisio*, 410 U.S. at 15, 93 S.Ct. at 772. If a grand juror may initiate an investigation based on personal knowledge, he may use that knowledge and discuss his views with fellow jurors when considering whether to indict.

One of the prosecutors told the grand jury that since all the prosecutors signed the indictment, all felt an indictment was warranted. The prosecutors further expressed their opinions on the credibility of some of the witnesses. The district court found this to be error. However, the

presentment of the indictment informs the grand jury that the prosecutors are convinced that an indictment should be returned. Thus, the fact that a prosecutor conveys such an impression to the grand jury does not require the dismissal of the indictment. *United States v. Cederquist*, 641 F.2d 1347, 1353 (9th Cir. 1981). It is not improper, as was done here, for an attorney merely to state an opinion as to guilt or as to any fact at issue, as long as it is clear to the jury that the opinion is based only on the evidence that is before the jury and that the jury itself can evaluate. *United States v. Morris*, 568 F.2d 396, 401 (5th Cir. 1978). Thus, a prosecutor may state, "I believe the evidence has shown the defendant's guilt," but he may not state, "I believe that the defendant is guilty." *Id.* at 402. Further, any implication raised by the prosecutors' comments was countered by the fact that they, on several different occasions over the two days, told the jurors that it was the grand jury's function to decide who was telling the truth, what facts the evidence would support, and what type of charge, if any, the evidence would support.

The most troublesome issue in this case occurred after the grand jury voted on the original indictment proposed by the prosecutors. After deliberations, one juror (not the foreperson) announced to the prosecutors:

> We have a discussion going that—well, being in the final analysis of all things that we had in the past, you know, that everyone had the chance to cast their ballot according to what they believe, and that it came out 10-10. And, that's the way it stands. Do we go before the federal magistrate

with this?

The prosecutor responded: "We have just encountered a point of law that I have never encountered before which is less than twelve grand jury votes." This is an incredible response, considering that the prosecutor had earlier correctly informed the grand jury that if less than twelve members of the grand jury vote in favor of an indictment, the foreperson will endorse the indictment "Not a True Bill" and return it to the court. The prosecutor's response to the jury was error, and we find it highly objectionable.

Although the prosecutor's statement constitutes error, it is not reversible error. The proceedings that occurred after this unfortunate comment was made demonstrate that the grand jury definitely exercised its own independent will and was not overborne by the prosecution. The prosecutors correctly informed the grand jury that if twelve or more jurors would approve of some of the counts, they could vote on each count or pass an indictment with fewer counts and fewer defendants. Part of the model jury charge recommended by the Judicial Conference of the United States states:

> Frequently charges are made against more than one person. It will be your duty to examine the evidence as it relates to each person and to make your finding as to *each* person in the relationship in which they may be joined in an indictment against more than one person.

(emphasis in original). Although one juror insisted that the deliberations were over, several others indicated that they would like to consider the counts individually. The grand jury then voted fourteen to six to amend the proposed indictment.

[4] The prosecutor may not involve himself in deliberations but may advise the grand jury as to its duty. The transcript shows that it was not clear whether the tie vote meant that the grand jury had rejected all counts or only the specific combination of counts in the proposed indictment. Since the grand jury's duty was to review the charges against each person and since it was apparent that there was some uncertainty among the jurors as to whether they were able to split a proposed indictment, the prosecutors acted properly in attempting to be sure that portions of the indictment that could be passed were not eliminated because the grand jury incorrectly viewed the proposed indictment as inseparable and did not choose to pass other counts.

[5] The jury returned from its second vote and told the prosecutors that it would like to see an amended indictment that included charges related to beatings but did not have charges on the arrests. Since the indictment had also included charges of unlawful detention in addition to unlawful arrests, the prosecutors asked whether the grand jury also wanted to eliminate all charges relating to unlawful detention. The prosecutor's question was appropriate, since the jurors' comments on returning from

the vote did not indicate whether these counts should be dropped. The discussion between the prosecutors and the grand jurors was brief, and the jurors' comments made it quite clear that their intention was to eliminate only charges relating to the initial arrest of an individual.

After further deliberation, the grand jury returned an indictment, dropping six counts and three defendants from the original proposed indictment. This revote was proper. There is no doctrine that limits a grand jury to only one vote on a proposed indictment, and the prosecutors are free to submit alternative proposed indictments to the jury. The power of the grand jury "is continuous, and is therefore not exhausted or limited by adverse action taken by a grand jury or its failure to act, and hence may thereafter be exerted as to the same instances by the same or subsequent grand jury." *United States v. Thompson*, 251 U.S. 407, 413, 40 S.Ct. 289, 292, 64 L.Ed. 333 (1920). Even if a grand jury merely wanted to revote on the same indictment, it could do so.

In conclusion, although the prosecutors' immediate response to the tie vote misstated the law and was error, this misconduct was not of such extremity that the will of the grand jury was overborne. The grand jury is allowed to amend the original indictment, and it is expected that there will be some interplay between the prosecutors and the grand jury in this process. We therefore vacate the order of the district court and reinstate the indictment.

VACATED.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-3551

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

JOHN E. McKENZIE, DALE BONURA,
STEPHEN FARRAR, STEPHEN REBOUL,
RONALD F. BRINK, THOMAS R. WOODALL
and RICHARD LEBLANC,
Defendants-Appellees

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion JUNE 18, 5 Cir., 1982, __F.2d__).

(August 30, 1982)

Before CLARK, Chief Judge, GEE and GARWOOD, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, nad a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX "D"

United States Code, Title 18:

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

§ 241. Conspiracy against rights of citizens

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $10,000 or im-

prisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

As amended Apr. 11, 1968, Pub.L. 90-284, Title I, § 103(a), 82 Stat. 75.

§ 242. Deprivation of rights under color of law

Whoever, under color of law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race. than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

As amended Apr. 11, 1968, Pub.L. 90-284, Title I, § 103(b), 82 Stat. 75.

APPENDIX "E"
SUMMARY OF PREVIOUS CASE HOLDINGS

Federal Courts have been far too reluctant to exercise their supervisory authority over grand jury proceedings. Only in cases of obvious injustice have indictments been dismissed. For example, when a prosecutor knowingly presents perjured testimony to a grand jury, *United States v. Thompson*, 576 F.2d 784 (9th Cir. 1978); and see footnote 51 in *United States v. McCord*, 509 F.2d 334 (D.C. Cir. 1974), or when a government attorney labors under a conflict of interest, *United States v. Gold*, 470 F.Supp. 1336 (N.D. Ill. 1963), or when an unauthorized person has invaded the secrecy of the grand jury, *United States v. Braniff Airways, Inc.*, 428 F.Supp. 579 (W.D. Tex. 1977), or when a prosecutor has abusively questioned a defendant who had expressed a desire to rely on his Fifth Amendment privilege against self-incrimination, *United States v. DiGrazia*, 213 F.Supp. 232 (N.D. Ill. 1963); *United States v. Wells*, 163 F. 313 (C.D. Idaho 1980), indictments have been dismissed.

On the other hand, the Circuits have approved or condoned, at least, many other forms of less dramatic abuse. Misstatements by government agents regarding immaterial matters and a failure to disclose *Brady* and *Jenks* material did not warrant the dismissal of an indictment. *United States v. Kathey*, 591 F.2d 268 (5th Cir. 1979); *United States v. Merlino*, 595 F.2d 1016 (5th Cir. 1979), cert. den. 444 U.S. 1071 (1980). Similarly, subpoenaing the defendant's announced trial witnesses before the grand

jury, prior to the trial, has been held not to be so damaging as to require dismissal. *United States v. Merlino, supra.* Government cooperation with an informer who was caught in a litany of outrageous lies and a DEA agent threatening defendants with harsher penalties if they refused cooperation were held not to justify dismissal. *United States v. Owen,* 580 F.2d 365 (9th Cir. 1978); see also *United States v. Morrison,* 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed. 2d 564 (1981). A government cover-up of its spying on defendants likewise was held legally innocuous. *United States v. Crow Dog,* 532 F.2d 1182 (8th Cir. 1977), *cert. den.* 430 U.S. 361 (1981). See *United States v. Cederquist,* 641 F.2d 1347 (9th Cir. 1981); *United States v. Chanen,* 549 F.2d 1306 (9th Cir.), cert. den. 434 U.S. 825 (1977); *United States v. Broward,* 594 F.2d 345 (2d Cir. 1979); *United States v. Thompson,* 576 F.2d 784 (9th Cir. 1978) (grand jury was not told of previous affidavit of government witness which might have damaged that witness' credibility, found not to be deceitful enough); and *U.S. v. Ciambrone,* 601 F.2d 616 (2d. Cir. 1979) (Government failed to reveal in response to grand juror's question that defendant may have been coerced by threats against his life thus justifying commission of the alleged perjury, such abuse not arising to the level required to dismiss indictment), for other judicial approval of questionable prosecutorial misconduct.

Finally, this Court last term in *United States v. Morrison,* 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed. 2d 564 (1981) upheld an indictment in spite of egregious Sixth Amendment violations. This Court held that the alleged attempt-

ed abuse had been unsuccessful and thus no prejudice had befallen the defendant.

Hence, a myriad of cases state what is not sufficiently abusive of the independence of the grand jury. This case of unambiguous government overreaching presents this Court the opportunity to clearly articulate the outer limit of governmental abuse.

APPENDIX "F"

SPECIFIC FACTS AND DIALOGUE

After the indictment was read to the grand jurors, prosecutor Reed addressed the group (in pertinent part):

> *"The indictment is signed John Volz, Stephen P. Clark, Michael D. Johnson and Morris W. Reed. And, that would not have been—he would not have signed the indictment without a careful examination of all the evidence that has been presented to you and the relevant statutes involved that appear on the front of the indictment. And, he would not have signed the indictment had he not thought that the evidence—had he not thought that the evidence satisfied the elements of the statutes, 18 U.S.C. 242, 241 and 2 you know, for aiding and abetting. That goes for me, also...*I would like to briefly say that everyone would like to think that our police officers are performing their duties and performing the duties according to the law. We certainly hate to see any police officer *because he dons a police badge and gun and nightstick and black jack and mace and has the authority to make arrests* and use that force to take custody and have that individual bound over by the Court for trial. *He does not have the authority that places him above the law.* And, when a police officer, just like a politician or anybody else, violates the laws, they must be held *accountable for people to retain and maintain faith in the system, in our system as it works.* So I just wanted to say that Mr. Volz signing this indictment and also by my signing this indictment, this indictment that we think...this indicates that an evaluation of the evidence by us, it seems...*we have concluded certain...that it has certainly*

> *satisfied the elements* as dictated by the law. We are satisfied by the evidence that has been presented to this jury and it's up to you ladies and gentlemen to make your decision during your deliberations..." (R. X 159-162) (Emphasis added)

Following this, the grand jury retired.

Sometime later, the grand jury called the government attorneys back into the room. The transcript resumes with comments by prosecutor Johnson: "We get the impression from some of the grand jurors that you have concluded your work." (R. X 175). A grand juror promptly responded that no indictment was returned-"...it came out ten-ten. And that's the way it stands. Do we go before the Federal Magistrate with this?" (R. X 176)

Johnson responded:

> "We have just encountered a point of law that I have never encountered before which is less than twelve grand jury votes." (R. X 176).

Mr. Reed quickly interjected, "Let me check with Mr. Volz and see what he wants." (R. X 176). Before checking with Mr. Volz, however, Mr. Reed asked if the grand jurors needed any additional information or additional evidence (R. X 176). A negative response followed.

Johnson then asked if the charges could be amended to make any indictment possible. A juror responded that such had been discussed, but:

> "Why should we go a second time on this and give it a second shot when it failed on the first shot? Say it would be questioned on the first shot, would we—if it passed on the first shot, would we come back and give it a try on a No True Bill?"

Despite this apparent conclusiveness of the decision, Johnson went on, urging the grand jury to reconsider. The grand jurors were advised that they may vote several times and that they had not concluded their deliberations until the return is made to the Magistrate (R. X 179).

Finally, one grand juror asked if the indictment could be arranged so that the charges were not so "grave" (R. X 180). Johnson admonished the grand juror that such "is not for you to decide" (R. X 180). "Your decision is to believe there is probable cause to decide that they have violated the law." (R. X 180-81). Another juror then began to explain his rationale for concern on the voluntariness aspect of the arrest charges. Johnson said that he did not "want to get too much into your thoughts and deliberation process" (R. X 180), but stressed that the evidence did not really present a conflict in that regard (R. X 181-82). Johnson then asked the grand jurors "to indicate to us certain counts that you have problems with so we can either discuss them more fully, consider omitting those counts from the indictment and presenting (sic) the indictment in a different form for your consideration..." (R. X 183). A juror responded:

> "With all respect, it seems that you have asked

> us for a decision, and we have given you one. My question is: If it had gone the other way, would you all now be in here requesting discussions to eliminate certain counts?" (R. X 183).

To which Mr. Johnson defended:

> "Well, the members of the Grand Jury have raised this question and—" (R. X 183).

The colloquy continued until one grand juror became insistent:

> "A Juror:
> "You asked for a decision. We have voted on written ballots. There is no chance the count was not correct. It's over. That's it. Over. Finished."
>
> "A Juror:
> "Mr. Johnson—"
>
> "Mr. Johnson:
> "No, that is your opinion, and you are certainly entitled to express that to this Grand Jury and continue to adhere to your convictions which you have stated."

Following additional discussion, Mr. Reed suggested that the foreman ascertain if the jury wished to reconsider any of the counts of the indictment and to report to the prosecutors what they wanted deleted or altered. (R. X 185). The prosecutors continued to offer their services and noted that it would be regrettable for the lengthy grand

jury deliberations to end incomplete. (R. X 186-88). Whereupon, one juror informed the prosecutors that some of the grand jurors could not agree on the Dabdoub and Keller counts. Johnston replied that, "We are inviting you to discuss it." (R. X 188). Prosecutor Reed then encouraged the grand jury to take another look at agreeing on some of the counts. The jurors acquiesced and the prosecutors left the room for the grand jury to reconsider. (R. X 191).

When the prosecutors re-entered, a grand juror announced that the group would consider some revision.

Specific questioning regarding the various charges followed, with grand jurors explaining that the unlawful detention aspect was unacceptable. Mr. Reed argued otherwise. (R. X 193-194)

Additional questioning and discussion continued. Then another juror more fully described their question regarding the arrest which troubled them. (R. X 195). The prosecutors noted that they needed to check the law, and that since it had gotten late, the grand jurors should suspend their deliberations and return the next day to further deliberate. Johnson also noted that such would allow the prosecutors a chance to get together with the U.S. Attorney and decide if they wished to present an amended indictment or to ask the grand jury for a final decision on the present one. (R. X 196). Johnson re-urged a suspension of the proceedings and assured the jurors that they could make their decision without prejudice the following day. (R. X 197)

After a break, the U.S. Attorney, John Volz, entered the grand jury room. He assured the grand jurors that he was not before them to push anyone around, but that he understood that some of the grand jurors had health problems. He urged them to go home, eat, and get a good night's sleep. (R. X 202). One of the grand jurors interrupted Mr. Volz, stating that a decision on the indictment had already been made, that there was no reason to come back the following day. Volz responded that if such were the case, a No True Bill had in effect been rendered. But he added that the jurors should understand that they could reconsider. (R. X 203-204). Volz suggested various possible revotes regarding the indictments, but one grand juror made it clear that there was no doubt as to what the vote would be regarding the proposed indictment. "You will get a No True Bill." (R. X 210). Volz again encouraged the grand jurors to return the following day to reconsider. (R. X 213). He concluded his comments with the following remarks:

> "Really, I think everyone's going to feel better tomorrow morning. You know that. And, I think *the case will get a much fairer shake* in terms of your not being tired and hungry." (R. X 215) (Emphasis added)

Following discussion of the publicity surrounding the case and the Brilab trial in which Volz was involved at the time, the grand jury retired and decided to return the following day.

When the grand jury convened the following morning, a new indictment was promptly presented for the grand jurors' consideration. They were again solicited to inform the prosecutors of any difficulties they had accepting the charges. (R. X 234-235). They were similarly reminded that they could vote as many times as they wished until they were satisfied. (R. 235).

After further discussion, the grand jury retired again for deliberations. Subsequently, a True Bill was returned.

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No. 82-554

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN E. McKENZIE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that there was prosecutorial misconduct before the grand jury that justified dismissing the indictment.

On July 9, 1981, a federal grand jury in New Orleans, Louisiana, returned a five-count indictment charging petitioners (seven New Orleans police officers) with beating or otherwise intimidating citizens in violation of federal law, in the course of the police department's investigation of the murder of a police officer in November 1980. The district court granted petitioners' motion to dismiss the indictment, finding that several of the prosecutors' comments and actions before the grand jury amounted to serious misconduct, which made a finding of actual prejudice to petitioners unnecessary (Pet. App. A-1 to A-23). The court of appeals reversed, holding that the indictment should be dismissed only if the prosecutors' conduct actually prejudiced petitioners by overbearing the will of the grand jury (*id.*

A-29); the court of appeals then found that only one of the complaints concerning the prosecutors' conduct was justified, and that single comment did not affect the grand jury's independence (*id.* at A-30 to A-34).

Petitioners contend (Pet. 10-12) that the court of appeals erred in ruling that they had not been prejudiced by the prosecutors' conduct. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss the indictment. If petitioners are acquitted following a trial on the merits, their claims will be moot. If, on the other hand, petitioners are convicted, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment of conviction. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1982

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[1]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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